

**THE CEC COUNCIL'S DISCRETIONARY DECISION MAKING UNDER ARTICLE 15
OF THE *NAAEC* AND ITS LEGALITY AT INTERNATIONAL LAW**

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Presented to

Meeting of the North American Consortium on Legal Education (NACLE) Comparative
Environment Law Research Project

Tuesday, June 14th, 2011

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THE CEC COUNCIL'S DISCRETIONARY DECISION MAKING UNDER ARTICLE 15 OF THE *NAAEC* AND ITS LEGALITY AT INTERNATIONAL LAW

I. Introduction

In a letter¹ sent on the 17 January 2011 addressed to the Commission for Environmental Cooperation (CEC), Ecojustice's² Executive Director demands the withdrawal of one of their submissions made in accordance with the Submission on Enforcement Matter (SEM) process under Article 14 and 15 of the *North American Agreement on Environmental Cooperation*³ (*NAAEC*). Ecojustice's submission⁴ pertained to the Canadian federal government apparent lack of enforcement of the *Species at Risk Act*.⁵ The CEC Secretariat, mandated to consider the validity and relevance of submissions made according to Article 14 of the *NAAEC*, had transmitted its opinion to the Council indicating that the submission warranted a factual record as to over sixty endangered species protected under the *Act*, its opinion being the fruit of a diligent evaluation. However, through its discretionary authority under paragraph 15(2), the Council has the final say on the development of the factual record. In this case, three years later, the Council decided to authorize the development of a factual record, but only for less than a sixth of the species mentioned in the Secretariat's recommendation. Ecojustice considers, with good reason, that when the Council limits the scope of the factual record at its own convenience, this factual record is unable to provide an objective assessment of the facts relating to the federal government's enforcement of the *Act*. The public interest is genuinely served only when the assessment is objective and independent.

¹ The letter is available on Ecojustice's < http://www.ecojjustice.ca/media-centre/media-release-files/cec-withdrawal-letter/at_download/file>.

² Formerly known as the *Sierra Legal Defense Fund*.

³ *North American Agreement on Environmental Cooperation*, 14 September 1993, 32 I.L.M 1480, available on the Commission for Environmental Cooperation's website <<http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567>> [*NAAEC*].

⁴ Submission SEM 06-005 of the 10 October 2006, submitted in the name of fourteen Canadian and American environmental non-governmental organizations.

⁵ *Species at Risk Act*, S.C. 2002, c. 29.

The aim of the *NAAEC* is to strengthen cooperation in fostering environmental conservation and protection, with the long-term goal of contributing to the creation of a sustainable North American economy.⁶ The *Agreement* nonetheless specifies that these objectives shall be accomplished without interference with either the Parties' sovereignty or their right to autonomously determine their environmental standards.⁷ Moreover, it does not seek to impose any obligation beyond their obligation under national law to "effectively enforce [their] environmental laws and regulations through appropriate governmental action."⁸ This paper argues that the recognition of the Parties' sovereignty should not come at the cost of the success of the SEM process when the Parties agreed to its particular institutional design within the *NAAEC*. This design implies the respect of the roles attributed to the CEC's organs, the fostering of the *Agreements* aims and purposes, and the consideration for the rightful expectations of the citizens involved in such recourse with legal attributes.

From a strict legal perspective, the absence of damages awards or injunctions to act, combined with the low number of submissions throughout the existence of the SEM process, could indicate that the process put in place by the *NAAEC* is not significant in impact. However, compared with other international law initiatives, such a procedure is atypical and offers interesting possibilities both from a practical and a theoretical perspective. In fact, the insertion of such a "spotlighting" mechanism in an international agreement is unusual considering that international law seldom offers a recourse to private parties⁹ (Part II). At the time of its negotiation, a great number of environmental non-governmental organizations (ENGO) demonstrated their support for such an innovative international legal mechanism of

⁶ *NAAEC*, *supra* note 3 at para. 1(b), (f)-(h).

⁷ *Ibid.* at Article 3.

⁸ *Ibid.* at para. 5(1).

⁹ See generally Philip Alston and James Crawford, *The Future of UN Human Rights Treaty Monitoring* (Cambridge, UK: Cambridge University Press, 2000) at p.16.

environmental governance.¹⁰ In the same way, many ENGOs that made a submission to the SEM process have offered positive comments on their experience regarding the effects of the factual record on fostering national environmental protection.¹¹

Nevertheless, Ecojustice's discontent with the actions of the Council must be viewed within the context of a general dissatisfaction with the SEM process that has been present for over ten years. Many actors that have been directly involved with the process, such as the CEC Secretariat and the authors of past submissions, as well as the stakeholders to the *Agreement* such as the Joint Public Advisory Committee (JPAC), the National Advisory Committees (NAC), the Governmental Advisory Committees (GAC), and civil society in general, have expressed serious concerns with the Council's use of discretionary power¹² (Part III). For that matter, the situation has already been covered by widely distributed newspapers, among others in the May 29th, 2000 edition of *Business Week*¹³ and the June 20th, 2000 edition of the *Washington Post*.¹⁴ This discontent mainly concerns the effects of the Council's actions on the SEM process's essential qualities to its effective functioning, such as independence, equity, efficiency, utility, and legitimacy.¹⁵ Each of these is being suppressed by the Council's use of discretionary decision-making when limiting the scope of the submission. The weakening of these attributes, which are needed to meet the stakeholders' expected results from the SEM process, could be considered to result in three distinct situations of illegality at different levels of international law. (Part IV).

¹⁰ See the set of letters written by ENGOs in support of the governments' steps in *NAFTA & the environment : substance and process* (Washington, DC : Section of International Law and Practice, American Bar Association, 1995). See also Chris Wold, Lucus Ritchie, Deborah Scott et Matthew Clark, "The Inadequacy of the Citizen Submission Process of Articles 14 & 15 on Environmental Cooperation," (2004) 26 *Loy. L.A. Int'l & Comp. L. Rev.* 415, 416.

¹¹ David L. Markell, "Governance of the International Institutions : A Review of the North American Commission for Environmental Cooperation's Citizen Submissions Process," (2005) 30 *N.C.J. Int'l L. & Com. Reg.* 759, 788-789.

¹² These actors' opinion will be further developed in Part III. For additional informations on the history of the discontent see *Ibid.* at 782-785.

¹³ Elizabeth Malkin, "Taking the Green out of NAFTA," *Business Week*, 29 May 2000.

¹⁴ Editorial, "How to Wreck Trade," *Washington Post*, 10 juin 2000.

¹⁵ See generally Markell, "Governance of the International Institutions", *supra* note 11 at pp.782-785.

Firstly, at the level of an international organization, the use of discretion to disregard the Secretariat's recommendations contravenes the principle of effectiveness (*principe de l'effet utile*) as applied to the dispositions delegating the respective authority and competence of each organ of the Commission. The symptom of this situation of illegality is the intrusion of the Council into the independence of the SEM process, which is supposed to be guaranteed by the objective evaluation and decision-making of the Secretariat. Secondly, at the level of the Parties bound by international treaty law, the use of discretionary decision-making power of the Council involves interpreting and executing the dispositions of the *Agreement* in violation of the legal ramifications of the principle of good faith in treaty law. The symptom of such a situation of illegality at international law is the obstruction of the efficiency and effectiveness of the SEM process with respect to its contribution to the object and purpose of the treaty. Thirdly, at the level of the private parties who have access to a form of private recourse, the absence of a standard of review over the discretionary power of the Council contravenes principles harbored in the recognition of global administrative law. The symptom of this illegality is the loss of the process' legitimacy from the perspective of the authors of submissions.

Despite these situations of illegality at different levels of international law, the stakeholders to the SEM process cannot correct this situation without the goodwill and the intervention of the Parties. The acknowledgement of this impasse results in a situation where the only recourse would be to resubmit their contentions through the SEM process as a means of political pressure.

II. The Citizen Submission Process (Articles 14-15): “Fire Alarm” and Spotighting

Articles 14 and 15 of the *NAAEC* establish the parameters for the functioning of the SEM process, also referred to as the citizen submission process. Moreover, the procedure is also organized through the *Guidelines for Submissions on Enforcement Matters under Article 14 and 15 of the North American Agreement on Environmental Cooperation*¹⁶ (the *Guidelines*).

Paragraph 14(1) prescribes certain criteria pertaining to the formalities that govern a submission. For example, sub-paragraph 14(1)(d) prescribes that the submission should “appear[] to be aimed at promoting enforcement rather than at harassing industry.” Paragraph 14(2) assigns the Secretariat the responsibility of determining whether a submission merits a response from the concerned Party on the basis of certain factors such as allegations of harm to the submitter, the importance of the matter raised, and the presence or absence of private remedies at the national level. In such event, the Party must respond within 30 days by indicating, in accordance with paragraph 14(3), whether the environmental issues raised have already been the object or are presently the object of a judicial or administrative procedure, along with any other pertinent information. If a procedure exists or has existed, the Secretariat will end the SEM process at this stage. If not, the Secretariat has the authority under paragraph 15(1) to make a reasoned recommendation for the constitution of a factual record to the Council, with the support of its justifications. The constitution of the recommended factual record is then at the mercy of a two-thirds vote of the Council required by paragraph 15(2). Paragraphs 15(4) to 15(7) overview the constitution of the factual record, the final version of which can be made public by the Council subject to a two-thirds vote.

It is useful to note the additional precisions provided by the *Guidelines* in relation to the justifications required at different steps of the process by the Secretariat and the Council. On one

¹⁶ Adopted through Council Resolution 95-10, at Oaxaca, 13 October 1995 [*Guidelines*].

hand, with regard to the decision to recommend the creation of a factual record, the Secretariat has to justify its decisions and the Council can act in the light of the Secretariat's justifications.¹⁷ The Council can also ask for any relevant information to the extent that it has not yet been disclosed. On the other hand, the Council is under the obligation of justifying its decision only when it refuses the recommendation of the Secretariat.¹⁸

A. The Design of a *Fire Alarm* and *Spotlighting* Citizen Process under International Law

The citizen submission process does not seek to constitute a forum where citizens may call for stricter environmental standards. Rather, the submissions focus on the enforcement of current national standards. In fact, the political sub-discourse that led to the creation of the SEM process emanated from the ENGOs who feared that the *North American Free-Trade Agreement*¹⁹ (*ALENA*) would somewhat sacrifice the enforcement of national environmental standards in order to create commercial advantages.²⁰

1. The Domestic Actors' Demands that Led to the Creation of a Spotlighting Mechanism

The context that led to the creation of the *NAAEC* indicates that the Parties did not initially plan to create an institution with an environmental mission. Rather, they meant in responding to the demands of United States ENGOs, and, for Canada and Mexico, in agreeing to a political compromise in order to access the American market²¹.

The ENGOs, particularly in the United States, feared that a free-trade agreement would contribute to the degradation of the North American environment. In addition to a potential

¹⁷ *Ibid.* at para. 10.1.

¹⁸ *Ibid.* at para. 10.2.

¹⁹ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994 [*NAFTA*]).

²⁰ Kal Raustiala, "Police Patrols & Fire Alarms in the *NAAEC*," (2004) 26 *Loy. L.A. Int'l & Comp. L. Rev.* 389, 390.

²¹ *Ibid.*, p.399.

leveling down of North American environmental standards, these organizations also saw the threat of a “race to the bottom” in terms of the effective enforcement of current environmental standards, especially in Mexico where existing standards were rarely enforced.²² Faced with these pressures, the Clinton administration worried that without the creation of a parallel environmental agreement, the adoption of the *NAFTA* was in itself at risk.²³ In order to satisfy the ENGOs’ demands, objectives such as “strengthen[ing] cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices” (par. 1(f)) and “enhanc[ing] compliance with, and enforcement of, environmental laws and regulations” (par. 1(f)) would be promoted through a citizen submission process that would shed light on situations of non-enforcement of national environmental standards.

Citizen submission mechanisms had already been implemented in the American administrative system.²⁴ The introduction of such a mechanism at international environmental law is, however, a unique design that provides the means for the “enforcement of the enforcement.”²⁵ The citizen submission process of the *Agreement* is a process that fosters the divulgence of information with the purpose of putting poor or inexistent enforcement of environmental standards under the spotlight. A great number of significant ENGOs demonstrated their support for the proposed *NAAEC* with the objective of having a concrete and independent recourse on the basis of which political pressure campaigns could be built.²⁶

²² See Richard Revesz, “Rehabilitating Interstate Competition : Rethinking the ‘Race to the Bottom’ Rationale for Federal Environmental Regulation,” (1992) 67 *N.Y.U. L. Rev.* 1210 and Kristin Engel, “State Environmental Standard-Setting : Is There a ‘Race’ and is it ‘to the Bottom’?,” (1997) 48 *Hastings L.J.* 274.

²³ See Keith Bradsher, “The Free Trade Accord,” *New York Times*, November 14, 1993, p.14.

²⁴ See notably the *Clean Air Act*, the *Clean Water Act*, the *Endangered Species Act* and the *Toxic Substances Control Act*.

²⁵ Kal Raustiala, “International ‘Enforcement of Enforcement’ Under the North American Agreement on Environmental Cooperation,” (1996) 36 *Va. J. Int’l L.* 721.

²⁶ Raustiala , *supra* note 20 à la p.401.

2. *The Mechanism's Expected Benefits: Efficiency, Effectiveness and Citizen Overview*

In setting up the SEM process, the Parties expected that the spotlighting of the lack of enforcement of environmental standards would induce the Parties' governments to improve their behavior, thus increasing environmental protection at the scale of the continent. Therefore, the effective functioning of the SEM process contributes directly to the respect and promotion of the Parties' obligations set out in Article 5 of the *Agreement*.

In theory, the governments could simply commit to look at the current state of the enforcement policy of their environmental standards or, alternatively, to ensure the effective enforcement of their environmental standards on their own. By using a mechanism based on citizen submissions, the Parties rely on information provided by private actors. This form of delegation is beneficial to the extent that information on the effective enforcement of environmental standard is diffuse and difficult to collect. Since citizens or group of citizens across a territory can be attentive to the degradation of the environment and collect such information at the local level, they are in a good position to assess the enforcement of environmental standards, or lack thereof.²⁷ A mechanism of citizen submissions therefore has at its disposal more sources and a higher variety of specialized information at a lower cost, all the better to spotlight the lack of enforcement. At the center of the mechanism lies citizen oversight, a key factor for the legitimacy and the accountability of the system, in contrast with a system based on mere routine verification. The cost of such a mechanism in terms of Party sovereignty is lesser, given the limited nature of the private venue offered and the lack of sanctions.²⁸

Despite all the advantages offered by the introduction of a *fire alarm* and *spotlighting* mechanism such as the citizen submission process into an international framework, the

²⁷ Steven Schavell, "The Optimal Structure of Law Enforcement," (1993) 36 *J.L. & Econ.* 255.

²⁸ Philip M. Moremen, "Private Rights of Action to Enforce Rules of International Regimes," (2006) *Temp. L. Rev.* 1127, 1155.

institutional design of the CEC has enabled the Parties to weaken the independence, effectiveness and legitimacy of the process.²⁹ Through the use of the powers granted to the Council within the dispositions of the *NAAEC*, the Parties have interfered with the Secretariat's independence, avoided their international engagement towards the efficiency of the process, and undermined the legitimacy of its results. This was enabled by the tensions between the interests of the different actors involved in the citizen submissions process. By using its discretion to determine the scope of the upcoming factual record, the Council exacerbated these tensions rather than limiting them in accordance with its role of "supervisor" of the Commission and "guardian" of the *Agreement*.

C. An Institutional Design Prone to Tensions within the SEM Process

The *NAAEC* establishes an innovative institutional structure based on its sharing of authority within the CEC.³⁰ In addition to the Council, the *Agreement* establishes the Joint Public Advisory Committee (JPAC) as an advisory body to the Council and representative of the North American civil society. The administration of the CEC is mainly left to the responsibility of the Secretariat. Moreover, its role is relatively more important in comparison to other international institutions' secretariats.³¹

As a consequence of the design of the SEM procedure, the *NAAEC* Parties have not kept all powers and responsibilities to themselves.³² The *Agreement* articulates the roles of every actor involved throughout the process, and these must be presumed to contribute to the objective of the *Agreement* and of the SEM process. Thus, a question central to the functioning of the citizen

²⁹ See generally David L. Markell, "The CEC Citizens Submission Process : On or Off Course?" in David L. Markell et John H. Know, *Greening NAFTA : The North American Commission for Environmental Cooperation*, (Stanford: Stanford University Press, 2003).

³⁰ David L. Markell, "The North American Commission for Environmental Cooperation After Ten Years : Lessons About Institutional Structure and Public Participation in Governance," (2004) 26 *Loy. L.A. Int'l & Comp. L. Rev.* 341, 345.

³¹ *Ibid.* at pp.345-6.

³² *Ibid.* at p.274.

submission process is the articulation of the responsibilities of the actors involved, whether it be the citizen submitters, the Secretariat, or the Council, made up of the highest representatives of the Parties' executive branch in relation to environmental issues.

1. The Secretariat

The innovation in the distribution of the roles is the central position given to an independent Secretariat as the organ in charge of identifying the submission worthy of consideration in accordance with the *Agreement's* criteria. The responsibilities of the Secretariat are multiple and crucial to a process that will later involve a member of Council as the "target" of the submission and of the eventual factual record.³³

The Secretariat is one of the organs of the CEC, established according to Section B of Part III of the *NAAEC*. Article 11 makes provision for the "international character" of the Secretariat and provides that its "Executive Director and the staff shall not seek or receive instructions from any government or any other authority external to the Council." Article 11 thus requires the Secretariat to be independent from the influence of the Parties. By being independent, the Secretariat is therefore awarded significant authority over the administration and execution of the SEM process. It has authority on the reception of the submissions and their admissibility, the relevance of requesting a response from the Party concerned by the submission, and the relevance of recommending the development of the factual record. In relation with the later, the *Agreement* also attributes the Secretariat the responsibility of justifying and determining the scope of the recommended factual record. Afterward, with the consent of the Council, the Secretariat is responsible for overseeing the development of this factual record.

³³ *Ibid.* at p.347.

2. The Citizens, Civil Society and the Joint Public Advisory Committee

The Parties, through the text of the *NAAEC*, have devolved to the citizens the power of spotlighting the lack of enforcement of an environmental standard by the government of a Party-State. Through the opportunity of making a submission to the Secretariat in accordance with Article 14 of the *Agreement*, the citizens are given control at the outset of the process over the environmental situations that will come to the CEC's attention. Any citizen or group of citizens residing in one of the three Party-States may highlight an environmental situation occurring in any Party-State. The civil society of all Parties is thus given great latitude in initiating the SEM process. Within their submission, citizens may include information related to the environmental issue or to the enforcement of the standard from their own sources, thereby "triggering" the "fire alarm" at the awareness of a problematic environmental situation.³⁴

The public interest is also promoted by the JPAC, constituted in accordance to Article 16 of the *NAAEC*. The JPAC is composed of fifteen citizens equally representing the three Parties. Its role is to advise the Council on matters related to the *NAAEC* from a civil society perspective.³⁵ Therefore, the JPAC can provide advices on the preparation of the factual records, whether in relation to the scientific and technical aspects of the process or on CEC functioning leading to the development of a factual record, if those subjects are of interest for the public.³⁶

3. The Council

The Council is composed of cabinet-level or equivalent representatives of the Parties or their designees and is mainly described as the directive organ of the Commission.³⁷ Its mandate, as prescribed by paragraph 10(1), is to supervise the Secretariat. In addition, it serves the Parties as a

³⁴ See Raustiala, *supra* note 20.

³⁵ *NAAEC*, *supra* note 3 at Article 16, para. 4.

³⁶ *Ibid*, Article 16, para. 5-6.

³⁷ *Ibid*, Article 9.

forum for the interpretation and execution of the *NAAEC*, for the formulation of recommendations on the development and enforcement of environmental standards, and for the promotion of the effective enforcement of existing environmental standards.³⁸ Concerning the SEM process, once the Council has received a recommendation in favor of the development of a factual record, it has the power of allowing or refusing the instruction of the Secretariat's recommendation. Since the Council meets on average once a year, the Secretariat remains the core organ of the Commission, overseeing day-to-day activities.

Therefore, with these actors playing different roles and possessing distinct levels of control on the submission process, it is unsurprising that institutional tensions have emerged.³⁹ One thing is clear, however: the Parties did not demonstrate in the text of the *NAAEC* an intention of retaining univocal control over the process, since they devolved significant responsibilities to the Secretariat as well as provided the submitter a degree of freedom.

III. The Council's Controversial Use of Discretionary Power, Pressure from the JPAC and the Preservation of the Status Quo

The objective of a successful spotlighting mechanism, an idea that guided the determination of the distribution of powers among the organs of the CEC, also necessitates the identification of limits to the powers given to each organ. On one hand, it is clear that neither the submitter nor the Secretariat hold the decision-making authority necessary to obtain the development of a factual record. On the other, it is also clear that the Council does not have the *sua sponte* power to demand the development of a factual record. The submitter selects the environmental situation that he believes warrants the CEC's attention, the Secretariat sees to the quality of the submission

³⁸ *Ibid*, Article 10, para. 1-4.

³⁹ Anticipating the different institutional problems of the CEC short after its creation, see Pierre Marc Johnson et André Beaulieu, *The Environment and NAFTA : Understanding and Implementing the New Continental Law* (Washington D.C., Island Press, 1996).

and its compatibility with the *Agreement* and the *Guidelines*, and the Council then votes on the development of the factual record. The issue is that nothing in paragraph 15(2) indicates that this discretionary voting procedure implies the power to redefine the scope of what will be examined by the recommended factual record.⁴⁰ The *Guidelines* only indicate: “[i]f the Council votes to instruct the Secretariat not to prepare a factual record, the Secretariat will so inform the Submitter that the submission process is terminated.”⁴¹

Therefore, when the Council uses its discretion in order to reduce the scope of the matters covered by the recommended factual record and redirects its spotlight, it affects previous decisions taken by other actors at a previous stage of the process. Clearly, the most affected actor would be the citizen submitter, which explains why the JPAC reacted to the Council’s use of discretionary power. However, these interventions evidently had limited impact, as the status quo on the issue remains.

A. The JPAC and Secretariat’s Concerns with the Citizen Submission Processes since the Creation of the CEC

The JPAC had voiced its concerns with the use of discretionary power by the Council as part of the citizen submission process. The Advice to the Council of March 25th, 1999⁴² already reflected the JPAC’s frustration in relation with the Council’s attitude toward issues falling under Articles 14 and 15 of the *NAAEC*. For that matter, it disapproved the modifications to the *Guidelines* proposed by the Council, claiming that they would not be in the interest of “accessibility, transparency, independence of the Secretariat, balance/parity between party and submitter,

⁴⁰ *NAAEC*, *supra* note 3 at para. 15(2) : “The Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so.”

⁴¹ *Guidelines*, *supra* note 16 at para. 10.2.

⁴² Advice to the Council 99-01, Document of the CEC J/99-01/ADV/Rev.1.

impartiality, discretion and conformity to the *NAAEC*.” Additionally, the JPAC notes that the Council’s attitude could potentially sap “public confidence in the citizen submission process.”

The JPAC, with the support of the CEC, has given itself the mandate of examining the history of the SEM process, a work that has resulted in the June 2001 publication of the report *Lessons Learned: Citizen Submissions under Article 14 and 15 of the North American Agreement on Environmental Cooperation*⁴³ (*Lessons Learned*). In its conclusions, the JPAC highlights the role of the Secretariat in the SEM process as an independent, professional and qualified organ within the citizen submission process. It further makes recommendations to increase efficiency, promptness, transparency and accountability within the process. In particular, the JPAC emphasized the importance of justifying decisions rejecting citizens’ submissions, whether it is because the Secretariat decided not to recommend the constitution of a factual record or because the Council refused to approve the recommendation.

The JPAC reaffirmed its position in the Advice to the Council of October 23, 2001, but addressed its concerns directly to the Parties to the *Agreement* and their actions as members of the Council.⁴⁴ It concludes that they must show greater respect for the limits of the Council’s power over the process, limits to which they adhere by agreeing to the distribution of power laid out by Articles 14 and 15 of the SEM process. The JPAC demands that the Council preserve the independence of the Secretariat and act in a way that maintains the credibility of the process.

B. Brief Demonstration of Goodwill by the Council, and Back to Square One

In face of the JPAC’s accruing tensions and demands for greater transparency from the Council and respect of the Secretariat’s independence, the Council voted two resolutions that appeared to

⁴³ JPAC, *Citizen Submissions under Articles 14 and 15 of the North American Agreement on Environmental Cooperation, Final Report to the Council of the Commission for Environmental Cooperation*, 6 June 2001.

⁴⁴ Advice to the Council 01-07, Document of the CEC J/01-03/ADV/01-07/Rev.3.

be steps in the right direction. Resolution 00-09, often cited afterwards by the JPAC to remind the Council of its too easily forgotten commitments, clarifies the relationships between the Council and the Secretariat, as well as the Council and the JPAC. In the case of the Secretariat, the Council affirms its “unique role (...) regarding its responsibilities under Articles 14 and 15 of the NAAEC.” In the case of the JPAC, the Council indicates that “[t]he Parties, acting through the Council, shall consider the JPAC’s advice in making decisions concerning the issues in question relating to Articles 14 and 15 of the Agreement and shall make public its reasons for such decisions, bringing the process to conclusion.” In general terms, the Council places itself within the SEM process by taking into consideration “the need for transparency and public participation before decisions are made concerning implementation of the public submission process under Articles 14 and 15 of the NAAEC.” However, the language of the resolution maintains the ambiguity regarding the discretionary power of the Council in Article 15 of the SEM process.

More concretely, following up on the *Lessons Learned* report, the Council voted Resolution 01-06 expressing its commitment to justify its refusals of the constitution of factual records. This resolution represents a major step in the voluntary recognition of limits to the discretionary power of the Council in response to a demand for what could be seen as principles of procedural justice that would reinforce the SEM process’ contribution to the aim and purpose of the *NAAEC*.

Even though the Council affirmed the utility of justifying the refusal of a factual record, it seems it feels differently about limiting the scope of a factual record when voting in favor of its development. On November 16, 2001, the Council passed five distinct resolutions on five different submissions. Even more remarkable than the number of resolutions passed at once, four of these five resolutions significantly limit the scope of the factual record to be developed out of the submission. The content of the factual record voted by the Council would then greatly differ

from what was recommended by the Secretariat, and what the submitters expected. The four resolutions dramatically change the direction of the factual record and interfere with the expected course of the SEM process.⁴⁵

C. A Clear Stance Against the “Scoping” of Factual Records

Therefore, in this series of resolutions, the Council employed its discretionary power given by Article 15 of the *NAAEC* in order to significantly reduce the scope of four of five factual records. After these actions, the problem of the Council’ use of discretionary power has become the subject of more vigorous discussion among the activities of the JPAC. It did not take much time to provide its official reaction through its Advice to the Council of the November 30, 2001,⁴⁶ where it substantiated its frustration by demanding a public review on “the matter of limiting the scope of factual records.”

After having led many citizen consultations touching on, among other things, the question of scoping the factual records, the JPAC takes a definitive and clear stance on the issue in its Advice to the Council of December 21st, 2003.⁴⁷ It demands that the “Council refrain in the future from limiting the scope of factual records presented for decision by the Secretariat.” From its perspective, limiting the scope of the factual record undermines the Secretariat’s independence, central to the legitimacy of the SEM process.

One of the serious consequences of scoping is that the factual record obtained at the end of the process does not correspond to what the submitter initially inquired, nor to what the Secretariat recommended, thus affecting legitimacy. Furthermore, the use of discretion in order to

⁴⁵ These are Council Resolutions 01-08, 01-09, 01-10, 01-11, 01-12. For a summary of each resolution and a comparison of the submissions, see Markell, “Governance of the International Institutions,” *supra* note 11. All Council Resolutions are available on the CEC’s <http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=263>.

⁴⁶ Advice to the Council 01-09, Document of the CCE J/01-04/ADV/01-09.

⁴⁷ Advice to the Council 03-05, Document of the CCE J/03-05/ADV/Final.

scope the factual record highlights the conflict of interest of the Council when using such discretion. Also, the lack of justifications offered on the scoping of the factual record makes the SEM process even less transparent from the perspective of the submitter.

Thus, from the JPAC's perspective, the decision as to the scope of the factual record would rather be the Secretariat's to make, in accordance with the criteria set in Articles 14 and 15 and the objectives of the *NAAEC*. If Secretariat possesses the necessary expertise and the independence. By using its discretion relating to the development of a factual record in order to limit the scope of the upcoming factual record, the Council appears to be acting in the interest of the Party responding to the submission rather than in the interest of the *NAAEC*'s objectives.

Even the Secretariat displayed some reticence towards the Council's practice. In fact, according to the Secretariat, scoping could run counter to the object and purpose of the *NAAEC*. Emanating from the Secretariat, the organ in charge of ensuring the promotion of the *NAAEC* throughout the process, this opinion is carries substantial weight. In its notification to the Council in the case of *Migrating Birds*, the Secretariat rejected an interpretation of the *Agreement* that could justify scoping the factual records when their scope has already been determined in accordance with the objectives of the *NAAEC*:

[T]he failures that potentially pose the greatest threats to accomplishment of the Agreement's objectives, and the most serious and far-reaching threats of harm to the environment, would be beyond the scope of that process. This limitation in scope would seem to be counter to the objects and purposes of the *NAAEC*. The Secretariat declines to adopt a reading of the Agreement that would yield such a result.⁴⁸

⁴⁸ Article 15(1) Notification to Council that Development of a Factual Record is Warranted, CEC, Document A14/SEM/99-002/11/ADV, December 15th, 2000.

D. Analysis of the Status Quo in the Council Resolutions

According to the most recent CEC data,⁴⁹ seventy-six submissions were made by citizens or groups of citizens. These are geographically divided as follows: twenty-seven related to environmental situations in Canada, thirty-nine in Mexico, and nine in the United-States; plus one submission concerning a matter in Canada and the United-States. Of all these, twenty-two led to a Council Resolution on the development of a factual record. Of the four resolutions made before 2001, none significantly interferes with the scope of the factual record to be developed, including one that refuses the development of the factual record.⁵⁰

After the five resolutions that have been previously discussed as putting the issue of scoping on table, thirteen have been passed on the development of a factual record. Of these resolutions, five allow the development of the factual record demanded by the Secretariat,⁵¹ one refuses the development of any record at all,⁵² and seven demand the constitution of a factual record while interfering with the scope recommended by the Secretariat.⁵³

IV. The Negative Effects of Scoping as Symptoms of Illegality at International Law

When interfering with the scope of the factual record to be developed by the Secretariat, the Council and the Parties acting within it compromise several essential characteristics to the proper functioning of the citizen submission process. First, the Council's interventionism and interference with the Secretariat's independence has negatively affected the public confidence in

⁴⁹ Commission for Environmental Cooperation, *Article 14 Submission on Enforcement Matters* (internal document), Montreal, Process status as of 13 June 2011.

⁵⁰ These are Council Resolutions 96-08, 98-07, 00-01 (refusal) and 00-03.

⁵¹ These are Council Resolutions 03-04, 05-04, 05-05, 06-07 and 08-03.

⁵² Council Resolution 02-13.

⁵³ These are Council Resolutions 02-02, 02-03, 03-16, 04-03, 04-05, 08-01 and 11-02

the process⁵⁴. When it rearranges the roles of the different actors in the SEM process, the Council suppresses the perceived equity of the result by tainting it with its underlying conflict of interest, rather than preserving the independence of the process.

Second, when limiting the scope of the factual records through Council Resolutions, the Parties limit the situations that can be put under the spotlight by the SEM process. This result affects the utility of the process in reaching the *NAAEC*'s two main objectives. On one hand, scoping factual records limits the type and diversity of the situations that can be the object of a factual record. Up until now, situations of generalized or systematic lack of enforcement were excluded from the SEM process because of the negative interventions of the Council. This fact compromises the *NAAEC*'s objective of “foster[ing] the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations.”⁵⁵ On the other, reducing the scope of factual records also limits the capacity of the citizens to participate in the SEM process, which goes against another objective central to the *Agreement* – to “promote transparency and public participation in the development of environmental laws, regulations and policies.”⁵⁶ The decisions taken by the Parties through the discretionary power of the Council thus have a direct impact on the effectiveness of the citizen submission process as an international fire alarm and spotlighting mechanism.⁵⁷ Third, when employing a discretionary power without any standard of review or normative principles, the Parties can make decisions that have a negative impact on the process' legitimacy from the standpoint of the submitters.

⁵⁴ Chris Wold, “Evaluating NAFTA and the Commissions for Environmental Cooperation : Lessons for Integrating Trade and Environment in Free Trade Agreements,” (2008) 28 *St. Louis U. Pub. L. Rev.* 201, 206.

⁵⁵ *NAAEC*, *supra* note 3 at Article 1(a).

⁵⁶ *Ibid.* at Article 1(h).

⁵⁷ Markell “Governance of the International Institutionsm,” *supra* note 11 at pp.275-76.

All these negative effects of the Council's uncontrolled use of discretionary power over the development of the factual record can be interpreted as symptoms of illegality at international law. Each symptom corresponds to a different level of analysis of the principles of international law. First, the Council's intervention in the distribution of powers between the SEM process' actors could equal to a modification of the text of the treaty, an action that is only permissible to the Parties outside their participation to the Council. When the Council is making an executive decision, it must respect the principles of international organizations law, which prescribe the preservation of the balance of powers between the organs of the organization and their prescribed roles in the SEM process. Second, when interpreting the discretion of the Council at Article 15 as enabling the scoping of factual records, the Parties violate norms of international law relating to the interpretation and execution of treaties in accordance with the principle of good faith. The Parties are in effect pre-empted from using this discretion in a manner that would enable them to eschew their obligations based on the aim and purpose of the *Agreement*, to which they evidently agreed. Third, the use of the discretionary power without any standard of review conflicts with the principles of administrative law shared by liberal democracies, that could be transposed into international law with the recognition of a supranational rule of law. These shared principles, in addition to creating expectations from the perspective of citizens with access to a form of recourse, are in themselves prescriptions of what is needed for a legitimate process.

A. The Principle of Effectiveness and the Recognition of the CEC Organs' Powers

In refusing to abstain from intervening in the determination of the scope of the factual records, the Council has attracted negative comments from the JPAC, the National Advisory Committee and independent advisory committees.⁵⁸ In addition to the position of the JPAC that has already

⁵⁸ Wold, Ritchie, Scott et Clark, *supra* note 10 at p.425.

been described, the U.S. Governmental Advisory Committee condensed the different public opinions when declaring that the Council “has eviscerated” the Secretariat of its independence, and the process of its equity.⁵⁹ These categorical opinions oppose the interference of the Council into the checks and balances system of the SEM process, with the most fundamental check being the independence of the Secretariat as formulated in paragraph 11(4) of the NAAEC: “Each Party shall respect the international character of the responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities.”⁶⁰ Indeed, the chain of functions that composes the citizen submission process in Articles 14 and 15 seeks equilibrium between citizens’ information and participation, the independence and international character of the Secretariat, and the governmental representation through the Council.⁶¹ Each actor’s role must be executed in respect of the international law applicable to international organizations, in particular the principle of effectiveness as applied to the provisions attributing each organ’s authority.

1. International Law as Applied to International Organizations

International organizations are legal persons subjected to international law.⁶² Applicable international law includes general international law, the organization’s constitutive instrument and related international treaties.⁶³ Its constitutive instruments thus directly determine the

⁵⁹ Letter from Denise Ferguson-Southard, Chair of the Governmental Advisory Committee of the U.S. Representative to the CEC, to Christine Whitman, Administrator of the U.S. Environmental Protection Agency, 19 October 2001.

⁶⁰ *NAAEC*, *supra* note 3.

⁶¹ See Donald M. McRae, “Inclusion in a Factual Record of Information Developed by Independent Experts and the Autonomy of the Secretariat of the CEC in the Article 14 and 15 Process,” Prepared for the Secretariat of the CEC, University of Ottawa, 7 February 2000, p.23.

⁶² *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 6 June 1980, [1980] ICJ Rep. 67 at pp.89-90 : “International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.” See also Patrick Daillier, Mathias Forteau, Alain Pellet, *Droit International Public* (Paris: Éditions LGDJ Lextenso, 2009) pp.637 et ss.

⁶³ *Ibid.*

respective powers of its organs, themselves meant to be the reflection of the intention of its Parties. They are also under the constraint of the applicable international law, the norms of which are built around the Parties' will as reflected by the treaties.

International law recognizes that international organizations have explicit powers conferred to them by their constitutive act as well as implicit powers that are deemed necessary to the exercise of their explicit powers,⁶⁴ as recently restated by the International Court of Justice (ICJ) in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.⁶⁵ In this opinion, the ICJ also recognized the need to delineate limits to the powers of international organizations. The delineation of powers and their limits is also necessary for the organs of an international organization.⁶⁶ Therefore, the Secretariat and Council have the powers explicitly attributed to them through the *NAAEC*, plus the powers required to carry out these functions.

The *Agreement* sets out a certain hierarchy between the Secretariat and the Council, the latest considered as “the governing body of the Commission,” with the general responsibility to “oversee” the CEC. At first glance, the Council could have the power to revise the Secretariat's decisions. Yet, the responsibilities at the different steps of the SEM process are well-defined within the *Agreement*, sufficiently so that they are independent tasks. To that effect, the Council does not have pre-eminence over the Secretariat when the *Agreement* explicitly attributes precise executive tasks to the Secretariat. Indeed, authority over each step of the process is attributed to a precise actor or organ. With such a clear-cut organization of the relations within the process, international law seeks to determine and preserve the organs' competence sphere over their

⁶⁴ *Reparation for Injuries Suffered in the Service of the United Nations*, [1949] ICJ Rep. 1174 at p.182 : “Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being”

⁶⁵ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, [1996] ICJ Rep. 66.

⁶⁶ *Effect of Awards of Compensation Made*, [1954] ICJ Rep. 47; See more recently the decisions of the United Nation Security Council which act on the basis of its implicit power to create the International Criminal Tribunal in ex-Yugoslavia, SC Res. 827,S/RES/827(1993).

respective steps of the SEM process.⁶⁷ An international norm is particularly pertinent in ensuring that the Council's discretionary power is used within the respect of the Secretariat's spheres of competences: the principle of effectiveness.

2. Effectiveness: an International Norm Constraining the Council's Use of its Discretionary Power

The principle of effectiveness, understood as an international norm, prescribes that each power attributed to an organ of an international organization should be exercised in a way that does not result in the annulment of a power explicitly given to another organ of the organization. Therefore, any provision of a treaty that attributes a power to an actor should have its intended effects and be necessary to the determination of the treaty's obligations. This allocation of power cannot be annulled by the use of another power, which would implicitly appropriate itself the power to act or decide of another actor.

On the face of the *NAAEC*, a series of important powers and responsibilities are clearly attributed to the Secretariat. The Secretariat actually has the responsibility of assessing whether a submission deserves a factual record.⁶⁸ In doing so, it also determines the appropriate scope for the factual record. The capacity to assess the scope is the consequence of a series of other responsibilities attributed to the Secretariat, namely judging the initial validity of the submission according to criteria of form and content,⁶⁹ judging whether the situation under the spotlight in the submission deserves a response from the concerned Party,⁷⁰ and finally judging the pertinent content of the factual record to be recommended to the Council, in the light of the Party's

⁶⁷ Philippe Sands et Pierre Klein, *Bowetts Law of International Institutions*, (London: Sweet & Maxwell, 2009) pp.42-48.

⁶⁸ *NAAEC*, *supra* note 3, Article 15, para. 1.

⁶⁹ *Ibid.* Article 14, para. 1.

⁷⁰ *Ibid.*, Article 14, para. 2.

response.⁷¹ Even though in certain matters the Council has the function of overseeing the Secretariat, its functions within the SEM process do not include supervising the Secretariat in making independent decisions. The text of the *Agreement* is the only parameter establishing the tasks of the Secretariat in judging the submissions.

It is not unusual for an agreement to assign executive functions to the Secretariat of an international institution;⁷² indeed, the international law applicable to international organizations was developed precisely to enable these secretariats to fulfill their responsibilities without interference from potentially concurrent actors. The text of the *Agreement* only attributes the Council the authority of the decision regarding the development of a record. The acts of recommending its development and of determining the scope of the recommended record in accordance with the criteria set in the *Agreement* are powers within the competence of the Secretariat, not the Council. When the Council intervenes in the determination of the factual record, it contravenes the principle of effectiveness understood as a norm of international law by annulling the authority explicitly devolved to the Secretariat, authority that the latter should exercise in the absence of any control from the Council.

3. The Council's Resolutions Limiting the Scope of the Factual Records are Ultra Vires

Granting the Council the right, through its discretionary power, to revise the decisions made by the Secretariat within its explicit authority would run counter to the principle of effectiveness. As a norm of international law, this principle prescribes the preservation of the meaning of power-

⁷¹ *Ibid*, article 15, para. 1.

⁷² Henry G. Schermers and Neils M Blokker, *International Institutional Law* (Leiden: Hotei Publishing, 2004) at p.190.

attributing provisions within a treaty.⁷³ Applying this norm to the act of scoping and the creation of a record altogether different from the one recommended, it appears the Council's resolutions limiting the scope of the factual record to be developed would be *ultra vires* since the *Agreement* does not give the Council the power to develop factual records *sua sponte*. Such power is shared between the initiative of the citizens and the executive authority of the Secretariat.⁷⁴

An action is generally considered *ultra vires* when the nature of the act is outside the scope of its author's authority. Although, on one hand, the meaning of an *ultra vires* act in the context of international organizations is not yet precisely defined,⁷⁵ and, on the other, the Council's decisions are devoid of any form of review, the Council's resolutions may still be *ultra vires* in and of themselves. The *ultra vires* character of an action is just as discernable in the international context than in a national one.⁷⁶

When the Council's actions are *ultra vires* to its powers as distributed among the different actors of the SEM process and have the effect of constraining the Secretariat's powers, the Council is modifying the *Agreement*. However, this prerogative is the Parties' only, as enunciated by Article 48 of the *NAAEC*. If it has been established that an organ cannot act in a manner that impairs its own decisional power,⁷⁷ it can even less be allowed that it acts with the effect of limiting the decisional power of another organ. Moreover, the administrative charge should also be considered as an effect of the *ultra vires* actions of the Council. Intuitively, it might appear that limiting the scope of the factual record would reduce the administrative burden of the

⁷³ This principle is used by the Appellate Body of the World Trade Organization, notably in the case *Unite-States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R : “An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”

⁷⁴ See Markell “On or Off Course?,” *supra* note 30 at pp.284-285.

⁷⁵ Chittharanjan Felix Ameransinghe, *Principles of the Institutional Law of International Organizations* (London: Cambridge Studies in International and Comparative Law, 2005) at p.196.

⁷⁶ On the subject of applying the concept of *ultra vires* an international context, see *ibid*, p.195.

⁷⁷ See e.g. the decision of the European Court of Justice in the *Soci t  R gie Networks v. Direction de Contr le Fiscale Rh ne-Alpes Bourgone*, 2008 E.C.R. 0000, para. 94-95.

Secretariat. In reality, it has had the opposite effect. The history of the factual records demonstrates that records with very focused questions often require more work of the Secretariat.⁷⁸

4. Parallel between the Actions of the Council and the Decisions of the Parties

With such interventions, the Council annuls the Secretariat's independent use of its own power, and negatively affects the equity of the resulting factual record. Of course, the absence of judicial review creates an undesirable situation, which results in the absence of a corrective mechanism for *ultra vires* decisions.⁷⁹ However, the Council's actions also implicate the Parties to the *NAAEC*. The Council, as organ of the CEC, maintains a proximity relation with the Parties by taking "other such actions ... as the Parties may agree."⁸⁰ Furthermore, the Parties themselves associate the Council's decision with their own position.⁸¹ In addition to the content of the agreement, the Parties must also act in accordance with international law.

Alternatively conceptualized, the previous analysis of illegality at international law observed the conflict between the powers delegated by the Parties to a political organ, the Council, and to an independent executive organ, the Secretariat.⁸² In addition to the rules of international law applicable to the relation between these two organs, other rules are applicable to the organ that represent the Parties' concerted decisions because of the particular status of Party-States at international law. If the symptom of the violation of international law norms by an

⁷⁸ Environmental Law Institute. *Issues Relating to Articles 14 et 15 of the North American Agreement on Environmental Cooperation*, 31 October 2003 at pp.13-14.

⁷⁹ Amerasinghe, *supra* note 75 at p.207.

⁸⁰ *NAAEC*, Article 9, para. 5.

⁸¹ See e.g. Executive Order 12915 (13 May 1994) of the American government: "To the greatest extent practicable, pursuant to Articles 15(1) and 15(2), where the Secretariat of the Commission for Environmental Cooperation ("Secretariat") informs the Council that a factual record is warranted, the United States shall support the preparation of such factual record."

Curtis A. Bradley et Judith G. Kelley, "The Concept of International Delegation," (2008) 71 *Law & Contemp. Probs.* 1, 9.

international organization's organ were observable at the level of the SEM process, this symptom being the negative effect on the independence and equity of the process, the symptom of the violation of an international law norm by the Parties will be observed at the level of the *NAAEC* as a treaty. At the treaty level, a symptom of illegality has indeed been observed: the conflict between the results of a factual record's scope as limited by the Council with the objectives of the *Agreement* and the goal of the SEM process.

When noticing this conflict with the objectives of the *NAAEC*, it would be reasonable to believe that the Parties contravened the principle of good faith in the interpretation and execution of a treaty. Indeed, significant norms of international law based on the principle of good faith binds directly the Parties to an international treaty in interpretation and execution of the obligations within this treaty and requires respecting and promoting the goal and object of the treaty. The issue of scoping factual records through Council's resolutions could therefore be looked in terms of the compatibility of such decisions with the legal norms based on the principle of good faith as applicable to the Parties involved within the Council's decision. While the Council is constrained in its decisions to respect the attribution of power to the Secretariat, the Parties' constraint is that they must ensure that the Council's decisions constitute an interpretation and execution of the *Agreement* compatible with its object and purpose.

B) The Importance of the Aim and Object of a Treaty in its Interpretation and Execution

While Part A presented an analysis of the attribution of powers within the SEM process at Articles 14 and 15 of the *NAAEC*, this Part focuses on the Parties' obligation to act in conformity with the engagements found within the *Agreement*. When the Parties intervene through the Council to limit the scope of a factual record to be developed, the result of the SEM process will not conveniently address the environmental situation that incited citizens to make a submission in

the first place. Indeed, the purpose of these submissions is often to shed light on a situation of generalized lack of enforcement of environmental regulations. A scoped factual record is not able to shed light on such generalized situations that happen to be even more harmful for the environment in comparison with isolated or punctual lack of enforcement.⁸³ Therefore, when the Council uses its discretionary power over the development of the factual record in order to limit the scope of the record, the Parties are also interpreting and executing the *Agreement* to this end. Discretion to completely reject the factual record is thus interpreted and executed by the Parties in order to enable scoping. Since Article 10 of the *NAAEC* attributes the interpretative authority of the agreement to the Parties, they may propose such an interpretation on their own. However, justification for the Council resolution must be compatible with the principle of good faith in the interpretation and execution of treaty obligations. Good faith prescribes conformity with the aim and object of a treaty at each of these steps. Council resolutions taken to limit the scope of the factual record conflict with two major objectives of the *NAAEC*: the promotion of the enforcement of environmental standards and civil society's participation.

As an international institution formed in international law, good faith is a principle that should govern its internal processes.⁸⁴ The principle is used in international law mainly in two contexts. On one hand, it is used as a source and method of treaty interpretation as prescribed by Article 31 of the *Vienna Convention on the Law of Treaty*⁸⁵ (*VCLT*). On the other, it is a principle associated with norms of international law in the execution of States' obligations. These norms notably include the customary norm of *pacta sunt servanda*, also codified at Article 26 of the *VCLT*, and the prohibition of abuse of right. These positive norms, based on principle of good

⁸³ While specific and isolated situations of lack of enforcement of an environmental norm can be explained by the normal exercise of discretion as provided by the regulations, the accumulation of decisions in favor of the absence of enforcement might be in itself a situation of lack of enforcement of the standard provided by the regulations.

⁸⁴ Amerasinghe, *supra* note 75 at pp.15-20.

⁸⁵ Vienna Convention on the Laws of Treaties, 22 May 1969, 1155 UNTS 331[*VCLT*].

faith, could be used to limit the Council's discretion within Article 15 of the *NAAEC* by constraining the Parties in promoting the *Agreement's* aim and object.

1. Promoting the Aim and Object of the NAAEC in the Parties Interpretation

In certain organizations, the organs have interpretative authority over the text of their constitutive treaty.⁸⁶ In these kinds of situations, the ICJ's jurisprudence and the European Court of Justice's jurisprudence (ECJ) demonstrate a tendency to demand that the method of interpretation used by the Parties ensure the efficiency of the organization, efficiency measured upon the realization of the treaty's aim and purpose. Since this approach refers to the aim and purpose of the organization rather than the will of the Parties, it is categorized as a theological approach.⁸⁷ In the context of the *NAAEC*, the Council does not have this interpretative authority. Its role is limited to the examination of disputes between the Parties on questions of interpretation. Parties maintain their power over the interpretation of the *Agreement*, power that they must use in pursuant to the applicable norms of international law. Good faith prescribes the treaty equivalent of effectiveness within an organization, being the completion of the aim and purpose of its constitutive instrument. It intervenes as an "arbitrator" between the Party employing its interpretive power over provisions of the treaty and the Party as guarantor of the treaty obligations.

a) The CVDT and Customary Norms of Interpretation

Article 31 of the *CVDT* is considered to represent the codification of the international customary norm of interpretation⁸⁸ and prescribes that "[a] treaty shall be interpreted in good faith in

⁸⁶ "There is some authority for the proposition that a treaty of a constitutional character should be subject to different rule of interpretation to allow for the "intrinsically evolutionary nature of a constitution," Jennings and Watts (eds), *Oppenheim's International law*, 9th edition, 1992, at 1268, citing *Rights of US Nationals in morocco*, [1952] I.C.J. Repts 176, 211

⁸⁷ Amerasinghe, *supra* note 75 at pp.44-49.

⁸⁸ Malcolm N. Shaw, *International Law*, (Cambridge, U.K.: Cambridge University Press, 2008) at p. 903; Anthony

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Furthermore, it indicates that the context of a treaty includes, without being limited to, its text, its preamble and its annexes. Article 31 thus prescribes as a basic norm the use of the “ordinary meaning” of words.⁸⁹

In this light, Article 15(2) of the *NAAEC* only indicates that the Council has the power to “instruct” the development of the factual record to the Secretariat. Such a formulation, on the basis of its ordinary meaning, leaves the possible content of the instructions the Council undetermined. The ICJ wrote on the ordinary meaning of words: “What makes sense to one may not make sense to another. Ambiguity may lie hidden in the plainest and most simple of words even in their natural and ordinary meaning.”⁹⁰ In such an impasse provided by the lack of definitive content, the interpreter has to adopt a teleological approach in attributing meaning to an organization’s constitutive instruments. This interpretation process made in good faith in the light of the aim and purpose of the treaty leads to the pursuit of what would constitute the reasonable effects of the text.⁹¹

b) The Aim and Object of the NAAEC in the Parties’ Interpretation

International law seeks to facilitate and recognize the expression of the will of the parties when determining the normative content of a treaty, all the while asking the parties to respect their commitment toward the aim and purpose served by this international instrument.⁹² If parties chose an open-ended and vague writing in order to facilitate treaty negotiation and ratification,

Aust, *Handbook of International Law* (Cambridge, U.K.: Cambridge University Press, 2005) at p. 52.

⁸⁹ Amerasinghe, *supra* note 75 at p.41.

⁹⁰ Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, [1962] ICJ Rep. 184 at p.184.

⁹¹ *Maritime Delimitation (Denmark v. Norway)*, [1993] ICJ Rep. 50 at para. 26.

⁹² Anne-Marie Slaughter et Annecoos Wiersema, “The Scope of the Secretariat’s Power Regarding the Submissions Procedure of the North American Agreement on Environmental Cooperation under General Principles of International Law,” legal opinion prepared for the CEC Secretariat, 4 February 2009 at para. 4.

such wording cannot be interpreted outside of the context of the treaty and without guidance from the aim and object of the treaty. Good faith imposes on the interpret the task of doing so in conformity with the aim and object of the treaty as described by its provisions and accompanying text, rather than the aim and purpose that would better serve the present interest of the Parties.

The *NAAEC*'s preamble emphasizes “the importance of the environmental goals and objectives of the NAFTA, including enhanced levels of environmental protection” and the “importance of public participation in conserving, protecting and enhancing the environment”. As part of the context of the *Agreement*⁹³, the preamble should be considered in good faith interpretation of the *Agreement*'s provisions⁹⁴. In the objectives of the *NAAEC* enunciated in Article 1, notable mentions are made of “foster[ing] the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations; [...] enhanc[ing] compliance with, and enforcement of, environmental laws and regulations; [and] promot[ing] transparency and public participation in the development of environmental laws, regulations and policies.” In addition, Article 4 prescribes general obligations in regard to the transparency of the CEC and public participation. All these objectives and obligations are even the more significant in the context of the SEM process considering that one of the criteria of validity for a submission established by Article 14(2) is that its development “advance the goals of th[e] Agreement”.

If the Parties would proceed with a good faith interpretation taking into account this context and the goals of the *NAAEC*, it would be reasonable to expect that the Council resolutions demonstrate a significant degree of deference toward the development of the factual record,

⁹³ E.g., the Dispute Settlement Body of the World Trade Organization often refers to the preambles of the Marrakech Agreement. See *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS48/R/CAN.

⁹⁴ *Territorial Dispute*. [1994] ICJ Rep. 726 at para. 53.

considering that the proposed scope is determined by the Secretariat in conformity with the text of the *Agreement* and its aim and purpose. Moreover, the use of good faith interpretation within the context of an international organization should lead to a presumption that the organ, which acts correctly in accordance with its competences, contributes to the aim and purpose of the treaty.⁹⁵ When the Parties act against this presumption on the basis of an expansive interpretation of the discretion given to the Council over the development of the factual record, they ignore the spirit of the *NAAEC* while it should be the very guide of their good faith interpretation.⁹⁶

2. Good Faith in the Execution of the Obligations Contained in the NAAEC

By enabling the scoping of factual records against the independent and objective recommendation of the Secretariat, the Parties do not textually violate the *NAAEC*. However, their obligation to execute the treaty in good faith prescribes that the Parties do not try to accomplish indirectly what is prohibited in first place.⁹⁷ For this reason, good faith execution is often equated with reasonable execution against the abuse of power or with an equitable execution.⁹⁸ Many examples of abusive and inequitable executions exist and they mostly involve the use of a provision of a treaty to nullify the prescription of another provision.⁹⁹ This sort of

⁹⁵ The ICJ uses a form of teleological interpretation in the context of international organizations, position that it made official in its 1949 opinion, and that it reassessed in the case of the *South-West Africa*.

⁹⁶ In that respect, see *Competence of the ILO* (1922), PCIJ (Ser. A/B) No. 49. and *Reparation for Injuries Suffered in the Service of the United Nations* (1926), PCIJ (Ser. B) No. 13.

⁹⁷ Elizabeth Zoller, *La bonne foi en droit international public* (Paris: Éditions A. Pedone, 1977) at p.81.

⁹⁸ Robert Kolb, *La bonne foi en droit international public, Contribution à l'étude des principes généraux de droit*, (Paris: Presses Universitaires de France, 2000) at p.264.

⁹⁹ Under Article 9 of the Treaty of Utrecht of 1713, France agreed to demolish its port and fortifications at Dunkerque and to never rebuild them. However, the French government, after having destroyed its installation, built a bigger port one league away. Great Britain contested this action, affirming that it was against the aim of the treaty. The French government conceded its breach of the treaty.

The Jews of Romania case: Article 44 of the Treaty of Berlin of 1878 stipulated that Romania should not practice any form of discrimination between its nationals on the basis of their religious opinions or beliefs. In order to create an exception for the Jewish nationals, the Romanian government decided to consider them not as nationals but as foreigners, leaving them without diplomatic protection. In the aftermaths of First World War, Romania was forced to recognize its Jewish nationals in accordance with the Treaty.

treaty execution conflicts with two norms of international law based on the principle of good faith: *pacta sunt servanda* and the prohibition of abuse of rights.

a) *Pacta Sunt Servanda*

Codified at Article 26 of the *VCLT*, the norm of *pacta sunt servanda* prescribes the good faith execution of the obligations contained in a treaty in force between its parties. The role of good faith in the execution of treaty obligations is to liberate the execution from the immovable wording of the treaty, moving toward a progressive approach based on the treaty's aim and purpose. *Pacta sunt servanda* thus impose all the more that the parties to a treaty in force fulfill the treaty obligations with the good faith of not acting in a calculated way against the aim and purpose of the treaty.¹⁰⁰ In its decision *Project Gacikovo-Nagymaros*,¹⁰¹ the ICJ affirms: "it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized."¹⁰²

The rule of *pacta sunt servanda* is of interest in the context of the SEM process since it imposes a standard on the execution of the provisions of the *NAAEC* independent from the will of the Parties.¹⁰³ It creates an obligation that limits the right of the parties to a treaty to act in accordance with their sovereign interest. In that sense, it is the guardian principle of stability and foreseeable nature of treaty obligations.¹⁰⁴ Above all, it is considered the "supreme norm" of the foundations of international law for its capacity of referring to positive as well as negative obligations. The International Law Commission has indeed affirmed that "the rule *pacta sunt*

¹⁰⁰ *Yearbook of the International Law Commission* [YBILC], Vol. II, 1964, pp.7-8.

¹⁰¹ *Project Gabcikovo-Nagymaros – (Hungary v. Slovakia)*, [1997] ICJ Rep. 7.

¹⁰² *Ibid.* at para. 142.

¹⁰³ YBILC, *supra* note 100 at p.60.

¹⁰⁴ Yenkong H. Ngangjoh, "Pacta Sunt Servanda and Complaints in the WTO Dispute Settlement," (2004) 1 *Manchester J. Int'l Econ. L.* 75, 77.

servanda require[s] not only the formal performance of treaty obligations, but also respect for their spirit and the fulfillment of the obligations deriving from general treaties to which the States concerned might be parties.”¹⁰⁵ Hence, this norm prescribes good faith execution as a customary obligation of international treaty law. To this specific application, good faith is defined as a state of mind including an honest belief in the purpose of an act and the absence of an intention to deceive or to obtain an undue advantage,¹⁰⁶ and governs the execution of the treaty.¹⁰⁷ With Article 11(4) of the *NAAEC* indicating that: “Each Party shall respect the international character of the responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities,” executing the *Agreement* in a manner that enables the Secretariat to fulfill its roles within the SEM process would constitute the execution of the obligations in accordance with good faith as prescribed by *pacta sunt servanda*.¹⁰⁸

b) Prohibition of Abuse of Right

The prohibition of abuse of right in the context of an international organization is similar to the notion of *détournement de pouvoir* in French administrative law.¹⁰⁹ That is because both are preoccupied with the contrast between the stated or unstated purpose of the exercise of the State competence and the purpose of the very instrument enabling this competence. In the case of a competence defined by a treaty-based regime, it cannot be exercised to the detriment of the aim and purpose of the treaty. A party will be of good faith if it uses its competences with the objective of furthering the aim and purpose of the treaty, or to the least not to impede them. Consequently, a party will be considered in bad faith, not if it is animated by malicious intentions

¹⁰⁵ *Yearbook of the International Law Commission*, Vol. I, 1964, p.30 (727^o Reunion of the Commission).

¹⁰⁶ Bryan A. Garner, *Black’s Law Dictionary*, West Group, 701, (1999).

¹⁰⁷ Bin Cheng, *General Principles of Law*, Chapitre 3, cited by the International Law Commission in *Yearbook of the International Law Commission*, Vol. II, 1964, p.8 (Commentary on draft article 55 on *pacta sunt servanda*).

¹⁰⁸ Slaughter and Wiersema, *supra* note 92 at para. 69.

¹⁰⁹ Alexander Kiss, “Abuse of Rights” in R. Bernhardt, *Encyclopedia of Public International Law*, Volume I, (Amsterdam: North Holland) at p.5.

(while this subjective condition is a possibility, it is hardly demonstrable), but simply when it does not exercise the competence in conformity with the purpose provided by the treaty.¹¹⁰

Since the Secretariat has already verified that the proposed factual record conformity with the criteria of Article 14, and in general to the aim and purpose of the *NAAEC*, and did so in an independent manner in an international environment, it is hard to conceive in what way contradicting the Secretariat decision would further the *Agreement's* aim. Consequently, the execution of the *NAAEC* enabling the scoping of the factual record could be interpreted as an abuse of right. While the complete refusal of the development of the factual record would call for reasons from the Council, the decision of scoping the factual record is not even held to that standard. Therefore the scoping of a proposed factual record leaves the Secretariat and the submitters, and for that matter any objective observer, to believe that its only purpose is to limit the impact of the SEM for reasons unrelated to the aim and object of the *Agreement*.

3. The Utility and the Limitations of the Principle of Good Faith

When the Parties use the decisional discretion offered to the Council by Article 15(2) of the *NAAEC* in order to prevent the development of a factual record with a certain scope recommended by the Secretariat, they interpret this discretion in contravention of the customary norms of interpretation and of the constraints imposed by international law on treaty execution. The norm of interpretation codified in Article 31 of the *VCLT*, as well as *pacta sunt servanda* and the prohibition of abuse of rights, are all anchored in the principle of the good faith of the parties as a general principle of international law. The principle of good faith requires evaluating the actions of the parties according to an objective standard based on the aim and purpose of the

¹¹⁰ Zoller, *supra* note 97 at p.119

treaty. The determination of the content of this objective standard could be used to delimitate the competences of organs within an international organization.¹¹¹

International treaty law contains few objective standards since the traditional conception of international law deems the parties only bound to the extent of the obligations they consented in the explicit content of the treaty. Good faith as a general principle represents a counterweight to the possible excesses of this conception. In the context of the *NAAEC*, the Parties have consented to leave a large discretion to the Council, which they will also have to interpret and execute themselves. Therefore, it is difficult to demonstrate the Parties' explicit consent to the imposition of a limit to this discretion without referring to an objective standard such as the principles of good faith.

It remains that even with an objective standard imposing restrictions to the control of the parties over the interpretation and execution of the treaties to which they are bound, the ultimate use and application of these norms depend on the will of the very same parties. Indeed, international law can be used as a corrective means only to the initiative of the parties. For example, the Statute of the ICJ gives it the competence to render advisory opinions on the constitutive instrument of a public international organization only to the extent that a State presents the issue to the Court.¹¹² In this case, international law leaves no recourse to the initiatives of the stakeholders in this type of recourse under an international treaty if the instrument does not provide it. In the case of the Parties to the *NAAEC*, they do not appear concerned by the need to rectify the potential issues of illegality of the use of the Council's discretion within the SEM process.

¹¹¹ *South West Africa Cases*, Preliminary Exceptions, [1962] ICJ Rep. 319 at p.336 : "Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it."

¹¹² *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 34 of the Statute of the International Court of Justice annexed to the Charter.

C) An Approach Independent from the Parties: Global Administrative Law and the Recognition of Legal Guarantees for the Submitter

In Part A, the Council's use of its discretion in order to counter the effects of the Secretariat legitimate decision-making is found to be in contravention to the norms of international law relating the legal use of a discretionary power by an organ of an international organization. In Part B, the interpretation and execution of this discretion by a Party with the consequence of undermining the independence of the SEM process without any justifying reason is found to be in contravention of the norms of international law governing the interpretation and execution of treaty obligations. Yet, in these two situations, the Parties haven't been willing to intervene in order to solve and prevent these situations of illegality. In truth, it would be naïve to wait for such intervention since all Parties involved have a conflict of interest between their roles as "accused" State in the SEM process, member of the Council and guardian of the *NAAEC*. All Parties benefit from this status quo to the detriment of the Secretariat, the aim and purpose of the treaty and, above all, the citizen stakeholders to the process. By being detrimental to the efficiency of the SEM process, the Council's use of its discretion puts at risk the legitimacy of the process from the point of view of the citizen interest it is primarily supposed to serve.¹¹³

Favorable conditions to the preservation of this status quo are maintained by the perpetuation of the traditional conception of international law based on States' sovereignty.¹¹⁴ In the absence of a standard of review imposed upon the Council and the Parties in the use of the discretionary powers conferred by the *Agreement*, a governance gap is created at the international

¹¹³ On the subject of the too frequent problem of legitimacy of international regimes, see Daniel C. Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law," (2006) 115 *Yale L.J.* 1490, 1493.

¹¹⁴ See Avnita Lakhani, "The Role of Citizens and the Future of International Law: A Paradigm for A Changing," (2006) 8 *Cardozo J. Conflict Resol.* 159, 172. This article promotes further citizen involvement in the international governance mechanism and describes the limits of a system that is solely based on State intervention. However, it takes for granted that the promotion of citizen involvement will be made in conditions that will ensure its efficiency. Yet, the efficiency of such mechanism still depends on the will of the States since they maintain control over the international instrument that would enable such involvement.

level. While at the national level, powers delegated by the executive or legislative branch would be submitted to a standard of legality requiring its compatibility with the enabling instrument and basic principles of justice, a discretionary power delegated to an international organ has no such standard of review and could thus be used against the aim and purpose of its constitutive instrument.

When the *NAAEC* ask for the involvement of civil society through the creation of a form of right of action at the international level, it also creates a commitment of the Parties toward these citizen stakeholders in the proper functioning of the mechanism and the contribution to their objectives. For example, the ECJ has already recognized for that the *Treaty of Rome* does not uniquely create obligations between its members but also induces binding commitments toward European citizens.¹¹⁵ Just as the proper functioning of public administrations,¹¹⁶ the success of the SEM process relies on its guarantees of independence and the autonomy of the actors involved rather than the unilateral decision making of the Council. The *Agreement*, in its architecture and in the establishment of the SEM process, recognizes the characteristics of good governance found in liberal democracies. Such recognition should imply the Parties engagement in acting in accordance with these principles. It should also enable the citizen stakeholders and beneficiaries of the process to have procedural rights recognized at the international level.¹¹⁷

¹¹⁵ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

¹¹⁶ The standard of review of an administrative action is there to attain a balance between “the need to ensure that administrative decisions are made by those whom the legislature deems best qualified to make them and the overall objective of maintaining an appropriate level of public confidence in the administrative system.” Hilary Delany, *Judicial Review of Administrative Action* (Dublin: Round Hall, 2009) at p.2.

¹¹⁷ The concept of taking in consideration the interest of non-State stakeholders at the international law level is not a new idea. It is at the basis of human right law, humanitarian law and environmental law. See Avnita Lakhani, *supra* note 114 at pp.175-176.

1. The Existing Conflict of Interest and the Absence of Standards of Review for Delegated Powers at International Law

The opposing roles of the Parties as guardian of the SEM process and as responding party to the citizens submissions puts at risk the legitimacy of the whole process by giving too much control the Parties exerted through Council on the process and the Secretariat. It has everything in appearance of a conflict of interest between the participation of the Parties in the decision of developing the factual record and the position of one or more Parties as “defending” parties. This situation has been known for a while. For example, the National Consultation Committee of the Canadian government had communicated what it saw as a “difficult” position of the Council members when they have to vote on the development of a factual record.¹¹⁸ To that effect, the Canadian Minister of the Environment in the 1996 Council had proposed as practice to be adopted by the Council that it unanimously accepts the Secretariat’s recommendations on the development of factual records.¹¹⁹

A tendency that has been observed is that the Party concerned by the citizens submission will be opposed to the factual record recommendation.¹²⁰ In fact, it is even plausible to think that, when the development of a scoped factual record is voted unanimously, the Council’s resolution was written by the Party concerned by the submission and reviewed for approbation to the other Parties. Because of what could be called “executive laziness,” or “diplomatic economy,” the

¹¹⁸ Letter from the Canadian National Advisory Committee to the *NAAEC* addressed to the Canadian government on the 13 March 2003: “The Article 14 and 15 process puts the members of the Council in a difficult position, as was noted by the independent committee that conducted the four year review of the *NAAEC*. They must vote on whether to support an investigation into the actions of their own country or a fellow Council member's country. This creates the potential for an apparent conflict of interest.”

¹¹⁹ *Ibid.* : “It was the reason the Honorable Sergio Marchi, Canada’s former Minister of the Environment, recommended at the 1996 Council meeting in a public statement that he wanted to make a practice of unanimously accepting recommendations by the Secretariat for factual records because to do so otherwise could create the appearance of a conflict of interest, or create animosity among parties. This stance paralleled a similar thrust in the Unit Order concerning voting on factual records.”

¹²⁰ Jonathan G. Dorn, “*NAAEC* Citizen Submissions Against Mexico : An Analysis of the Effectiveness of a Participatory Approach to Environmental Law Enforcement,” (2007) 20 *Geo. Int’l Envtil. L. Rev.* 129, 141.

Parties prefer to invest the least amount of energy in a submission for which it has no State concern and leave room for the use of its own discretion over future submissions that could be of concern. The Parties thus have a vested political interest in maintaining an interpretation and execution of the *NAAEC* without consideration for the legal principle of good faith.

When determining the scope of the factual record to be developed, the Council interferes with an independent and objective decision of the Secretariat. This intervention truly gives the impression that the fox is guarding the hen house.¹²¹ The potential of using the Council's discretion to Parties' political ends would enable them to control the issue of the SEM process, stripping it of its credibility. However, the textual formulation of the discretion does not exclude the possibility of scoping the factual record, nor does it create a standard or criteria to the Council's review of the Secretariat's decisions. It also omits any standard of review in the use of the Council's discretion that would ensure an equitable result for the submitters.

These kinds of governance issues are not unique to the CEC: they constitute a generalized problem in the international sphere. Indeed, the governance of an increasing number of issues and problems is transferred from the domestic arena to the international sphere. Once in the international legal sphere, the powers delegated through an international agreement are rarely submitted to a legal or democratic standard.¹²² In addition, national tribunals are known to maintain a deferential attitude toward actions taken by the executive branch of government in the international sphere on the basis that foreign affairs constitute a domain sealed from domestic affairs in which the executive is deemed to efficiently represent the collective national interest.¹²³

In the case of the *NAAEC* and the SEM process, there are serious reason to doubt this supposed

¹²¹ U.S. Advisory Committee Advice to the CEC No. 2000-2.

¹²² See Eyal Benvenisti et George W. Downs, "The Empire's New Clothes : Political Economy and Fragmentation of International Law," (2007) 60 *Stanford L. Rev.* 595 and Esty, *supra* note 113.

¹²³ See Eyal Benvenisti et George W. Downs, "National Courts, Domestic Democracy, and the Evolution of International Law," (2009) 20 *EJIL* 59, 62.

effectiveness of the executive in protecting and promoting the enforcement of national environmental standards and the public participation within the process.

2. *The Usefulness of Administrative Law in Preventing Governance Gaps*

In general terms, the legitimacy of a decisional process flows from its legal coherence and its capacity to offer clear and predictable responses to the expectations of the individuals affected by its results.¹²⁴ To this end, administrative law constitutes a unity of normative principles ensuring legitimacy since it facilitates the proper functioning of a public decisional process through reasonable results, and constraint the public authority to the extent necessary to the use of the delegated power.¹²⁵ This role of channeling the use of public authority toward legitimate efficiency would therefore be of much relevance in the context of an international organization that has the delegate mandate to respond to the citizens concerns over the environment while lacking in democratic mechanism.¹²⁶

The standard of legality ensuring the legitimacy of the decisions taken by an organ in an international organization that has the power to affect what resembles to a citizen's right of action should not depend on the sole willingness of the Parties. It should rather be constituted as an autonomous and objective standard based on principles of natural justice similar to what is commonly found in the national legal system of participating States.¹²⁷ International environmental agreements like the *NAAEC* demonstrate a progressive tendency found in the

¹²⁴ See Gunther Teubner, *Juridification of Social Spheres : A Comparative Analysis in the Areas of Labor, Corporate, Antitrust, and Social Welfare Law* (New York: Walter de Gruyter & Co, 1987) at p.3.

¹²⁵ See Richard B. Stewart, *Administrative Law in the Twenty-First Century*, (2003) 78 N.Y.U. L. Rev. 437 at p.457 and following.

¹²⁶ On the identification of these two central roles of administrative law, see Jerry L. Marshaw, "Recovering American Administrative Law : Federalist Foundations," *1787-1801*, (2006) 115 *Yale L.J.* 1256; On the subject of compensations for the lack of international democratic mechanisms, see Esty, *supra* note 113 at p.1522.

¹²⁷ Benedict Kingsbury et Richard B. Stewart, "Legitimacy and Accountability in Global Regulatory Governance : The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations," in K. Papanikolaou & M Hiskaki (eds.), *International Administrative Tribunals in a Changing World* (Esperia, 2008).

international legal sphere toward States' consent to governance mechanism. In turn, these mechanisms rely on the respect of certain standards to ensure their proper functioning.¹²⁸ While Parties to such environmental agreements might not explicitly consent to these standards of proper functioning, they should be considered self-imposing from the very consent to agreements putting in place these governance mechanisms. A parallel can be drawn here with administrative law standards that are imposed upon governmental actions according to the principles of justice and equity and in the objective of ensuring legitimacy.¹²⁹

In contrast with international investment agreements, the SEM process does not represent a formal right of action to the submitter, the result of the process having no binding effect.¹³⁰ Even though the SEM process is not an adjudicative recourse, it does share certain significant characteristics with this form of governance mechanism when offering a form of right of action at international law to private citizens parties.¹³¹ By offering a form of recourse to private citizens, and by giving them the right of being active throughout the process, the Parties have implicitly consented to a process in which the decisions should be legitimized by a standard independent from the Parties' will.

The assessment of this generalized problem of governance at the international level should be the driving force to move beyond the traditional conception of international law based on States' consent in order to introduce a form of global standard that could promote the legitimacy of delegated international decision making. A possible approach would be to introduce principles of administrative law as necessary to increase public confidence in international

¹²⁸ John H. Knox, "Separated at Birth : The North American Agreements on Labor and the Environment," (2004) 26 *Loy. L.A. Int'l & Comp. L. Rev.* 359, 360.

¹²⁹ See generally Eyal Benvenisti, "The Interplay Between Actors as a Determinant of the Evolution of Administrative Law," (2005) 68 *Law & Contemp. Probs.* 319.

¹³⁰ See Bradley N. Lewis, "Biting Without Teeth : The Citizen Submissions Process and Environmental Protection," (2007) 155 *U. Penn. L.R.* 1229, 1242.

¹³¹ See Laurence Helfer et Anne-Marie Slaughter, "Towards a Theory of Effective Supranational Adjudication," (1997) 107 *Yale L.J.* 273 .

institutions.¹³² A question that would then need to be answered in the context of the CEC as an international organization is: what would be the sources and the content of a standard that would be applicable to the decisions of the Council? It is natural to begin the search for answers in the text of the international instrument itself.

3. The Source of an International Standard of Review: The NAAEC and Procedural Guarantees

The SEM process is not unique at the international level, such a mechanism being used by the World Bank Inspection Panels and the United Nations Commission on Human Rights. In terms of international environmental law however, it is innovative as a process that provides surveillance of the enforcement of domestic law rather than additional international obligations. The SEM process could therefore represent a platform that goes beyond a conception of international law centered on the State and its sovereignty in order to open up legal consideration of the citizens' interest at the international level.¹³³ Furthermore, a mechanism promoting the participation of citizens affected by environmental issues should also provide for basic guarantees protecting the interest of the submitters and the affected environmental stakeholders. Indeed, the creation of a submission is a work-intensive enterprise that has the potential to benefit to large communities within the Parties territories.¹³⁴

It is therefore not surprising that the *NAAEC* contains several provisions that lay down basic procedural guarantees of an administrative law character agreed to by the Parties. Indeed, paragraphs 5(2) and 7(1)-(4) of the *NAAEC* prescribe the presence of procedural guarantees at the administrative, quasi-judiciary and judiciary level of the Parties environmental law enforcement,

¹³² Daniel C. Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law," (2006) 115 *Yale L.J.* 1490, 1495.

¹³³ Kal Raustiala in *Greening NAFTA* at p. 258.

¹³⁴ See Alain Brophy, "ALÉNA, ANACDE et environnement: 10 ans plu tard," (2006) 241 *Développement récents en droit de l'environnement* 153, 177.

including notably due process, impartiality and independence. Furthermore, Article 45 refers to “a reasonable exercise of their discretion” as the “effective enforcement of environmental law.” The *Agreement* thus provides for the creation of a certain inter-Parties standard of review over the use of discretionary powers by the Parties’ environmental administrations. Such a standard would probably be used by an arbitration panel established in accordance with Article 24 in the event of the settlement of a dispute, since this standard is independent, shared by the Parties, and neutral.

Consenting to the SEM process could also be considered as the recognition of alternate sources of obligations to the States’ consent in order to preserve the legitimate functioning of the process.¹³⁵ The normative foundations of this approach to the control of discretionary decisions of international organ would be to ensure good governance of the institution and the protection of the citizens’ interest in the consequences of the decisions.¹³⁶ The *NAAEC* even contains provisions demonstrating common standards among the Parties that could be used to control the Council’s discretion.

Outside of this international instrument, principles of administrative law of national jurisdictions, through their shared elements, form a supranational source of what would be global administrative law. Experiences from liberal democracies demonstrate that national administrative law standards constitute the basic legal source enabling verification and limitation of executive powers with the purpose of, on one hand, protecting individuals from arbitrary or unauthorized use of power and, on the other, of promoting the efficiency and utility of the administration in protecting the public interest.¹³⁷ The standard of review formulated through the different provisions of the *Agreement*, as well as the principles shared by the administrative law

¹³⁵ See Ellen Hey, “International Institutions and Global Environmental Governance” in “International Environmental Law at the Beginning of the 21st Century” (2006) 100 *Am. Soc’y Int’l L. Proc.* 303.

¹³⁶ *Ibid.* at 13.

¹³⁷ *Ibid.* at 4.

of the Parties could therefore close the governance gap of the absence of an international legal standard of review over discretionary power.¹³⁸

4. The Source of a Global Standard of Review: The Generalized Principles of Administrative Law within Liberal Democracies

The perspectives offered by public law and administrative law on issues of legality in the context of the use of discretionary powers are particularly pertinent. In fact, issues with the legitimacy of a decision process and the deficit of governance were at the heart of the citizens concerns when administrative standards of review were developed and systematized within public administrations.¹³⁹ Although these areas of law are traditionally confined to the national sphere, all of the liberal democracies' national systems of laws incorporate a standard of review for administrative decisions and this global norm should be applicable to international administrative decisions in which they are involved.¹⁴⁰ For example, the administrative standard prohibiting the abusive, unreasonable or discriminatory use of discretion by an administrative authority has found its way in the national laws of all *NAAEC* Parties. Notably, the reasonable use of discretion has received particular attention in Canadian and American law.¹⁴¹

An approach using a global administrative standard would not be incompatible with the approach used until now by the ICJ in relation with the use of principles outside international treaty law. The Court affirmed that international institutions are subjects of international law and are apt to develop their own rights and responsibilities.¹⁴² Therefore, international organizations are bound by general principles of international law and could be bound by principles recognized

¹³⁸ See Johnson, *supra* note 39 at p.195.

¹³⁹ See Esty, *supra* note 113 at 1494.

¹⁴⁰ See generally Tim Koopman, *Courts and Political Institutions* (Cambridge U.K.: Cambridge University Press, UK, 2003).

¹⁴¹ See Michel Bélanger, *La responsabilité civile de l'État et de ses sociétés en environnement* (Cowansville, QC: Éditions Yvon Blais, 1994).

¹⁴² Implicit approach of the ICJ in *Reparation for Injuries*, *supra* note 64.

and shared among participating States, that is legal principles shared by the national legal systems. According to Philippe Sands and Pierre Klein, these general principles could easily include procedural rules and criteria applicable to the organs of the institution.¹⁴³

National jurisdictions almost consistently recognize limits to the use of discretionary powers. That is because discretion is seldom considered unlimited and many situations can be deemed as abuse of competence,¹⁴⁴ including lack of good faith or lack of valid or pertinent reasons¹⁴⁵. In France, standards of review of discretionary decisions are at the basis of administrative law, with the notions of misappropriation of powers and excess of powers.¹⁴⁶ Misappropriation of powers, or *détournement de pouvoir*, constitutes a ground for review on the basis of the illegality of the purpose of an administrative decision, meaning that the purpose is incompatible with public interest or the aim of the legislator.¹⁴⁷ In English common law, the tribunal reviewing an administrative decision has the task of determining the goal and the intention of the legislator in granting discretion, as well as determining the ensuing explicit or implicit limits to the exercise of this discretion.¹⁴⁸ American administrative law recognizes, in the *Administrative Procedure Act*,¹⁴⁹ that an arbitrary, capricious or abusive use of discretion is illegal.¹⁵⁰ The test developed in the jurisprudence seeks to determine whether the decision was

¹⁴³ See Sands et Klein, *supra* note 67 at pp.463-464.

¹⁴⁴ See David Phillip Jones, Anne S. de Villars, *Principles of Administrative Law* (Toronto: Carswell, 2009).

¹⁴⁵ See e.g. *Roncarelli v. Duplessis* [1959] S.C.R. 121: “It is not proper to exercise the power of cancellation for reasons which are unrelated to the carrying into effect of the intent and purpose of the Act.”; *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1948] 1 K.B. 223 : “The exercise of such a discretion must be a real exercise of the discretion. (...) discretion must be exercised reasonably.”; *Associations des juristes de l’État c. Conseil des services essentiels*, 2006 QCCA 1574 : “Comme tout pouvoir discrétionnaire, celui-ci n'est pas absolu. Il doit être exercé dans une optique qui doit correspondre à la politique générale et à l'objet de la loi visée”.

¹⁴⁶ “excès de pouvoir” : “ensemble des violations... du principe de légalité,” similaire à l’abus de pouvoir.” Gérard Cornu, Association Henri Capitant, *Vocabulaire juridique*, (Paris: Presse Universitaires de France, 2004) at p.375

¹⁴⁷ René J.G.H. Seerden, *Administrative Law of the European Union, its Member States and the United States : A Comparative Analysis* (Oxford U.K.: Intersentia, 2007) at p.87.

¹⁴⁸ *Picture Houses v. Wednesbury Corporation*, [1948] 2 All ER 680, 682.

¹⁴⁹ 5 U.S.C. § 706.

¹⁵⁰ Seerden, *supra* note 147 at p.379.

based on pertinent factors in accordance with the aim of the law or whether irrelevant factor may have influenced the administrative agency's reasoning.¹⁵¹

It is clear that, had it been in the context of a national administration, the citizens submitters for whom their recommended factual record would have been limited in terms of scope through the Council's use of discretionary power could have demanded judicial review based on the lack of valid reasons, abuse of power or excess of power. After this overview of the standard of review found in common law and civil law jurisdictions, it is interesting to notice that the generalized principles of administrative law are similar to the norms of international law based on the principle of good faith. Therefore, these principles would be compatible with general principles of international law if only it was for the possibility of an interested party to invoke them in a competent forum. Unfortunately for the citizen submitters and other stakeholders in the SEM process, both the recognition of a standard of review and the possibility of exercising demand for review are both submitted to the goodwill of the Parties under the actual state of international law.

5. The Rationality of Administrative Law and Improvement Pathways for the SEM Process

The similarities between the application of the principles of good faith in international law and the standards of review within administrative law are not a coincidence. Tribunals resort to the notion of good faith to resolve disputes where what appears to be an illegitimate or unreasonable decision would be allowed by an excessively literal interpretation of the underlying law. In this context, finding an intention of bad faith is of lesser interest than reviewing the rational and coherent character of the decision.

¹⁵¹ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (DC Cir. 1970) cert. denied 403 U.S. 923 (1971).

In the absence of a structure of checks and balances in the system of an organization created by an international instrument upon which States have agreed, it is foreseeable that a governance gap emerges in the sphere outside of domestic jurisdiction. The existence of a standard of legality over the actions of an international institution's organs would ensure the prevalence of the aim and purpose of the organization over self-interested use of discretion, standard that could then be used by an independent reviewing authority.¹⁵² The checks and balances found in liberal democracies could be put in place at the international level through democratic participation, judicial review or transparency and self-accountability.¹⁵³ Moreover, in the case of judicial review, the generalized principles of administrative law would provide for a balance between the interest of all parties involved in complex issues such as the environment.¹⁵⁴

The World Bank recognized that certain situations where the interest of citizen stakeholders is directly affected by a decision, even non-adjudicative, necessitate the imposition of limits to discretionary decision power. It consequently limited the discretionary power of its Board of directors in the World Bank Inspection Panel Process.¹⁵⁵ While initially the World Bank inspection panels were subject to the discretion of the Board,¹⁵⁶ public pressures brought it to recognize that such discretionary decision-making was detrimental to the independence and legitimacy of the inspection panels' work.¹⁵⁷ It is thus in reaction to severe critics coming from civil society that the World Bank's Board agreed, through the adoption of certain clarifications,

¹⁵² *Ibid.* at 932-33.

¹⁵³ See E.-U. Petersmann, "Dispute Settlement in International Economic Law – Lessons for Strengthening International Dispute Settlement in Non-Economic Areas," (1999) 2(2) *JIEL* 189.

¹⁵⁴ Esty, *supra* note 113 at 1539; See Greg Block, "Trade and Environment in the Western Hemisphere : Expanding the North American Agreement on Environmental Cooperation into the Americas," (2003) 33 *Envtl. L.*, 501.

¹⁵⁵ Dana Clark et al., *Demanding Accountability : Civil-Society Claims and the World Bank Inspection Panel*, 2003.

¹⁵⁶ For more details, See "Review of the Resolution Establishing the Inspection Panel : Clarification of Certain Aspects of the Resolution" in *The World Bank Operational Manual Bank Procedures BP 17.55*, February 1997.

¹⁵⁷ "World Bank Inspection Panel," *Accountability at the World Bank – The Inspection Panel 10 Years On*, The World Bank, Washington D.C., p.32.

to authorize the inspections of the panels without undermining its decisions.¹⁵⁸ Furthermore, after the adoption of these clarifications, the Board can now only vote in favor or against the adoption of the factual record compiled by the inspection panel.¹⁵⁹ This initiative taken by the World Bank is compatible and even promoted by the general principles of international law previously reviewed.¹⁶⁰

In spite of the generalized dissatisfaction of the citizens involved in the SEM process toward the Council's discretionary interventions in the scope of the factual record, the Council has still not taken the initiative of amending the *Guidelines* in order to implement greater transparency in its use of discretion. If the ICJ is not competent to render an advisory opinion without the initiative of State, an alternate possibility would be to allow national tribunals to intervene in order to impose a standard of review on these international administrative actions.¹⁶¹ For example, in 2000, the Constitutional Court of Bosnia reviewed a decision of Bosnia's High Representative on that basis that his international actions had been taken as a national officer.¹⁶² This decision suggest the possibility that international actors can be held accountable for their actions in front of national courts. However, the problem with this approach in the context of the *NAAEC* is that the Council's decisions cannot be attributed to any single national authority. For example, in order for the Canadian Federal court to accept a motion for judicial review, the action in question must have been taken by a "federal office,"¹⁶³ which isn't the case of the CEC's

¹⁵⁸ *Ibid.* at p.29 : "These practices caused widespread concern, particularly within the NGO community, that the Board was undermining the independence and authority of the Panel. After much debate, the 1999 Clarifications terminated the preliminary assessment process and instead provided that, if the Panel so recommended following its initial review, the Board would authorize a full investigation without discussion and without making a judgment on the merits of the Request except as to certain 'technical eligibility criteria.'"

¹⁵⁹ See Wold, Ritchie, Scott et Clark, *supra* note 10 at p.440.

¹⁶⁰ See Kingsbury et Stewart, *supra* note 127.

¹⁶¹ See Benedict Kingsbury, Nico Krisch et Richard B. Stewart, "The Emergence of Global Administrative Law," (2005) *L. & Cotemp. Probs.* 15.

¹⁶² Constitutional Court of Bosnia-Herzegovina, Cas U9/00, 3 November 2000, para. 9.

¹⁶³ *Federal Courts Act*, R.S..C. 1985, c. F-7, section 18.1(4).

Council. With the importance of the judicial interventions in the achievement of the European Community's guarantees toward European citizens, it is not surprising that in the absence of such judicial or arbitral review in the context of the *NAAEC*, the interests of the citizens are left unprotected.

The issue of the legal review of the Council's decision in the SEM process of Articles 14 and 15 of the *NAAEC* ultimately faces a genuine governance gap, whether it is from the judicial or political angle. On one hand, the Council has no *sua sponte* obligation of restraining its use of discretionary power without the voluntary intervention of the Parties. On the other hand, the Parties cannot be constrained to act within the norms of international law through national review mechanisms since national officers have not taken these decisions. Therefore the Council and Parties' actions are exempt from legal review and from the political scrutiny applied onto national foreign policy.

V. Conclusion

The use of the Council's discretionary power provided under paragraph 15(2) of the *NAAEC* without any standard of review can result in a drastic reduction of the factual record's impact over the environmental situation put at light by the SEM process. It is also foreseeable that the final record will not even correspond to what the citizen submitters sought in the first place. While the initial submission demonstrates the citizens' will to shed light on a situation of lack of enforcement of national environmental standards, the Council can unilaterally dim the spotlight over these issues or even redirect it toward issues the Parties feels more comfortable dealing with. The use of discretion to this end constitutes a contravention to the conception of legality of a discretionary decision under international law at three different levels: the organizational level, the international level and the private right of action level. At each of these level, the use of discretion without a standard of review conflicts with principles of international: the principle of effectiveness in the attribution of powers between organs of an international institution, the principle of good faith in the interpretation and the execution of international treaties, and what could be considered the international rule of law providing a global standard of review of the international delegation of powers.

It may appear contradictory that the Parties whom consented to a restrictive and innovative mechanism under international environmental law do not act in a manner that would preserve the very qualities that make the SEM process a positive contribution to the aim and purpose of the *NAAEC*. On this idea, it is important to keep in mind that the balance of power in favor of the ENGOs was greater at the moment of the adoption of the *Agreement* than now.¹⁶⁴ It is therefore not surprising that the present governments use this flaw in the governance of the SEM process. However, the political gains made by the Parties at the ratification of the

¹⁶⁴ See Raustiala, *supra* note 20.

Agreement were based on those very voluntary constraints.¹⁶⁵ Despite the fact that the Council's actions and the Parties' inaction have resulted in a diminishing participation rate, they persist in their intention of limiting the scope of some factual records. This fact demonstrates that the SEM process supported by the ENGOs at the ratification of the *NAAEC* is effective in the furthering of its environmental objectives and impacts the governments concerned when fully functional.

The response provided during the SEM process by the concerned Party as well as the technical and scientific information contained in the factual record have no binding force on the Party. However, this set of information will enable involved citizens to come up with their own conclusions on the lack of enforcement. These conclusions and their political consequences may then push the Party's government in implementing significant changes. This chain of event could represent the renewal of the dispute resolution mechanism in an era of information and transparency. While this type of mechanism offers a new form of right of action for the private parties, it also provides the government with a credible engagement toward environmental protection.¹⁶⁶ It should therefore involve a commitment toward the reasonable use of discretion within the mechanism in order to preserve the characteristics that render the process effective in reaching its aim. The legislative branches are starting to extend their power of inquiry over the decisions made by national representatives in organs of international institutions.¹⁶⁷ Without such initiatives, ministerial representative acting in international mechanisms such as the SEM process are not bound to apply norms of international law and may even come to act against the aim and purpose of the organization¹⁶⁸.

¹⁶⁵ See John G. Ikenberry, "Institutions, Strategic Restraint, and the Persistence of American Postwar Order," (1999) 23:3 *International Security* 43-78.

¹⁶⁶ See Moremen, *supra* note 28 at p.1168.

¹⁶⁷ See David Zaring, "Informal Procedure, Hard and Soft, in International Administration," (2005) *Chi. J. Int'l L.* 547, 598.

¹⁶⁸ In the Canadian context, see Armand de Mestral et Evan Fox-Decent, "Rethinking the Relationship Between International Law and Domestic Law," (2008) 53 *McGill L.J.* 573, 642-643.

While one of the central ideas shared by Canada, the United States and Mexico in the creation of a North-American free-trade system was the preservation of State sovereignty of every member within the agreements of this new economic framework, the preservation of this sovereignty is problematic when it comes to a sophisticated mechanism of international law involving private parties. For example, the European Union's system initially provided for a limited complaint process, which was later extended to the environmental sector after a series of environmental disasters. This mechanism and the private individual who initiates it benefits from the procedural guarantees found across the EU legal system.¹⁶⁹ The complaint can even be brought to the ECJ, which will then decide on whether the Member-State applied relevant community laws and regulations correctly.¹⁷⁰ This possibility would constitute an extraordinary power within the North-American system because of the arising tensions with the principle of sovereignty. It remains that if the *NAAEC* seeks to involve citizens in its processes, it is reasonable to expect that they would be provided with procedural and administrative guarantees preventing an abrupt confrontation with the international governance gap. The most obvious example of this governance gap in contrast with national systems of law: the presence in the *Agreement* of requirements of impartiality in national judicial procedures, while the Council is not even in a position to affirm its impartiality and independence in regard to the SEM process.

As a result of these troublesome interventions of the Council's in the scope of the factual records, ENGOs perceived the opinion of the Secretariat as the significant judgment of the SEM process. With the initiatives to reform the CEC at the point of failure, a creative possibility for Ecojustice would be to resubmit their initial submission in relation with the lack of enforcement

¹⁶⁹ See Johannes Saurer, "The Accountability of Supranational Administration: The Case of European Union Agencies," (2008) 24 *Am. U. Int'l L. Rev.* 429.

¹⁷⁰ See Ludwig Kramer, "Rights to Complaint and Access to Information at the Commission of the EC», in Bernard Dussli, *Environmental Rights – Law, Litigation and Access to Justice*, (London,: Cameron May, 1995) at pp.53-57.

of the *Species at Risk Act* and to add the failure of the Canadian government to apply the *NAAEC* according to the norms of international law when limiting the scope of the factual record recommended by the Secretariat. The Secretariat would then have to look at the issue of the interpretation and execution of the *Agreement* by the government of Canada, using what little political effect the process can have with its current absence of standard of review over discretionary decisions.